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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,855	02/23/2004	James H. Keithly	PEP-0408 CIP	9428
61146 7590 01/18/2007 PEPSICO, INC. c/o GOODWIN PROCTER LLP 599 LEXINGTON AVE NEW YORK, NY 10022			EXAMINER NGUYEN, TRINH T	
			ART UNIT 3644	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		01/18/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/784,855

Applicant(s)

KEITHLY ET AL.

Examiner

Trinh T. Nguyen

Art Unit

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on Amendment dated 11/1/06.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) 1-19 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 20-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Double Patenting*

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 20-33 provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 20,22-26,28,29, and 31-39 of copending Application No. 10/017,126. Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 20 (narrower) of the copending Application No. 10/017,126 "anticipates" claim 20 (broader) of the instant application. Accordingly, the copending Application No. 10/017,126 claim 20 is not patentably distinct from the instant application claim 20, since the copending Application No. 10/017,126 claim 20 requires element (i.e., a concentration of not more than 1.5 weight percent) while the instant application claim 20 only require element (i.e., a concentration of not more than about 2 weight percent). Thus it is apparent that the more specific copending Application No. 10/017,126 claim 20 encompasses the instant application claim 20. Following the rationale in *In re Goodman* cited in the preceding

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paragraph, where applicant has once been filed an application or granted a patent containing a claim for the specific or narrower invention, applicant may not then obtain a second application or patent with a claim for the generic or broader invention without first submitting an appropriate terminal disclaimer.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 20-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keithly et al. (US 6523496).

Keithly et al. disclose that it is old and well known to provide a process for enhancing commercial poultry breeder operations comprising: supplying a space having an area at which poultry breeders are fed; providing a breeder poultry feed diet composition comprises a balanced feed composition and a citrus feed supplement (note that Keithly et al.'s citrus byproduct bedding litter can be considered as a breeder poultry feed diet composition wherein the citrus byproduct bedding litter can be eaten by the poultry chicks); and placing the breeder poultry feed diet composition within the area at which poultry breeders are fed.

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Keithly et al. do not teach that the citrus feed supplement being at a concentration of not more than about 2 weight percent based on the total weight of the poultry feed diet composition. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a citrus feed supplement being at a concentration of not more than about 2 weight percent, since it has been held that where routine testing and general experimental conditions are present, discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). Also, since applicant did not provide a reason and/or showing any criticality as to why the citrus feed supplement has to be at a concentration of not more than about 2 weight percent (see page 14 of the instant specification, Applicant only stated that "Typically, the citrus feed supplement is at a level of not greater than about 2 weight percent. Preferably, the feed supplement according to the invention is at a level of not greater than about 1.5 weight percent. An especially preferred range is between about 0.2 weight percent and about 1 weight percent"), it is believed that through trial and error during the testing procedure that one of ordinary skill in the art comes up with a desirable citrus feed supplement weight percentage to meet the design criteria for forming a breeder poultry feed diet composition having a balanced feed composition and a citrus feed supplement. Furthermore, it would appear that the concentration of the citrus feed supplement in Keithly et al. would provide an equally balanced feed composition and/or supplement as well.

Regarding claims 21-23, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a citrus feed supplement being at a specific concentration (i.e., a concentration of not greater than about 1.5 weight percent, a concentration of at least about 0.2 weight percent and up to about 1 weight percent, a concentration of at least about 4 pounds and up to about 16 pounds per ton) as claimed, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Also, since applicant did not provide a reason and/or showing any criticality as to why the citrus feed supplement has to be at a specific concentration as claimed in claims 21-23 (see page 14 of the instant specification, Applicant only stated that "Typically, the citrus feed supplement is at a level of not greater than about 2 weight percent. Preferably, the feed supplement according to the invention is at a level of not greater than about 1.5 weight percent. An especially preferred range is between about 0.2 weight percent and about 1 weight percent...especially preferred range is between about 4 and about 16 pounds per ton"), it is believed that through trial and error during the testing procedure that one of ordinary skill in the art comes up with a desirable citrus feed supplement concentration to meet the design criteria for forming a breeder poultry feed diet composition having a balanced feed composition and a citrus feed supplement. Furthermore, it would appear that the concentration of the citrus feed supplement in Keithly et al. would provide an equally balanced feed composition and/or supplement as well.

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Regarding claim 24, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a moisture content being at a specific content (i.e., of between about 5 and about 12 percent by weight) as claimed, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Furthermore, it would appear that the moisture content in Keithly et al. would provide an equally citrus byproduct as well.

Regarding claim 28, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a particle size of about 2 mm or less, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Furthermore, it would appear that the particle size in Keithly et al. would provide an equally citrus byproduct as well.

For claims 31-33, note that the method steps as claimed are inherently performed within Keithly et al.'s process wherein Keithly et al.'s process disclose a process of enhancing commercial poultry breeder feed diet composition as similar to those claimed by the applicant.

### ***Response to Arguments***

5. Applicant's arguments filed 11/1/06 have been fully considered but they are not persuasive.

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6. In response to applicant's arguments regarding to the showing of criticality of the recited citrus supplement concentration, it is noted that the showing of criticality of the recited citrus supplement concentration (i.e., 0.8 weight percent and 1.6 weight percent) is directed to the concentration/level of not greater than about 1.5 weight percent and is not directed to the concentration/level of not more than about 2 weight percent as claimed in claim 20. Therefore, there is no showing of criticality of the citrus supplement concentration of not more than about 2 weight percent as claimed in claim 20.

***Conclusion***

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trinh T. Nguyen whose telephone number is (571) 272-6906. The examiner can normally be reached on M-F (9:30 A.M to 6:00 P.M). The examiner's supervisor, Teri Luu can be reached on (571) 272-7045 for the purpose of status inquiry only. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

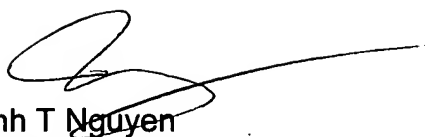
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Trinh T. Nguyen  
Primary Examiner  
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